IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

CWP No.: 493 of 2002.

Decided on: 18.07.2007.

Shanno Devi. … … Petitioner.

Versus

State of H.P. & Others. … … Respondents.

Coram:

The Hon'ble Mr. Justice Rajiv Sharma, J.

Whether approved for reporting? Yes.

For the Petitioner:	**Mr. Anuj Nag, Advocate.**
For Respondents No.1 & 2:	**Mr. M. S. Chandel, Advocate General with Mr. M.A. Khan and Ms. Meenakshi Sharma, Deputy Advocate Generals.**
For Respondent No.3:	**Mr. Ravinder Thakur, Central Govt. Counsel.**

Rajiv Sharma, Judge:

The brief facts necessary for the adjudication of this petition are that the petitioner's husband retired in the year 1975 and he expired on 14.5.1989. He was initially granted superannuation pension at the rate of Rs.11.40 payable with effect from 17.4.1975 and the same was enhanced to Rs.375/-. The petitioner made a representation to the Director

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Whether reporters of local papers be allowed to see the judgment? Yes.

of Education on 20.8.1992 seeking family pension. The Director of Education sent a communication to the Principal, D.A.V. Senior Secondary School, Kangra on 11th May, 2000 bringing to his notice that there was no provision of family pension under the Triple Benefit Scheme. She had earlier approached this Court by way of CWP No.655 of 2001 which was withdrawn on 13.8.2001.

Mr. Anuj Nag had strenuously argued that his client is entitled to family pension on the basis of Annexure P-3 dated 19th July, 1969. The learned Advocate General submits that there was no provision for grant of family pension to the family of teachers of Government Aided Schools. Mr. Ravinder Thakur had also endorsed the submissions of the learned Advocate General.

I have heard the parties and perused the record.

The petitioner's husband Shri Chaman Lal was working as a teacher in a privately managed Government Aided School and he retired from the school on 16th April, 1975. He was granted pension at the rate of Rs.11.40 with effect from 17.4.1975 which was subsequently enhanced to Rs.375/- per month. Her husband has died on 14.5.1989. It will be apt to reproduce para 22 of the Triple Benefit Scheme for the teachers of the Government Aided Schools in the Union Territories which reads as under:-

"22. <u>Family Pension:</u>

(i) A family pension, not exceeding the amount specified in sub-paragraph (ii) may be

granted to the family of a teacher who dies, whether while still in service or after retirement, after completion of not less than 20 years' qualifying service, for the following periods:-

(a) In the event of death of the teacher while in service, the pension shall be payable for 5 years from the date following the date on which the teacher dies.

(b) In the event of death of the teacher after retirement the pension shall be payable for the unexpired portion of 5 years from the date of retirement.

(ii) Subject to a minimum of Rs.20/- and maximum of Rs.75/- per month, the amount of family pension shall be:-

(a) In the event of death while in service, one half of the superannuation pension which would be admissible to the teacher had he retired on the date following the date of his death, and

(b) In the event of death after retirement, half the pension sanctioned for him at the time of retirement.

Provided further that the minimum pension may not exceed the full amount of pension sanctioned to the deceased teacher at the time of his retirement or in case he dies while in service the pension that would have been sanctioned had he retired on the date following the date of death."

It is evident from the phraseology employed in Rule 22 that in the event of death of the teacher after retirement, the pension was payable for the unexpired period of 5 years from the date of retirement. The maximum period prescribed for the payment of pension is 5 years. The petitioner was only entitled for family pension in the event of death of her husband after retirement for the unexpired portion of 5 years from the date of retirement. Accordingly, the petitioner is not entitled to any family pension as per Rule 22 (b) of the Triple Benefit Scheme, 1965.

Mr. Anuj Nag had brought to the notice of the Court that there is neither any provision for payment of pension nor gratuity to the teachers of private and Government Aided Schools. The State is paying 95% aid to about 140 schools in the State of Himachal Pradesh. The amount released by the State is utilized for paying the salary of teachers and other ministerial staff. It is desirable that there should be a scheme for grant of pension or other retiral benefits like gratuity etc. to the teachers employed in the Government Aided and private schools for improving their conditions of service. The Court can take judicial notice that the schools in private sector are charging exorbitant fees from the students. The students receiving education in the private institutions are entitled to be taught by well qualified teachers and for attracting the best talent their conditions of service are to be improved. If a scheme is framed by the State providing for pension or other

retiral benefits to the teachers, it will definitely improve the qualitative standard of teaching.

The Apex Court has discussed the scope of gratuity in ***Sudhir Chandra Sarkar Versus Tata Iron and Steel Co. Ltd. and Others, (1984) 3 SCC 369*** *as* under:-

> **"One more difficulty the High Court experienced in the way of the plaintiff maintaining the suit and recovering the amount of gratuity was that under Rule 10 gratuity was payable at the absolute discretion of the Company and cannot be claimed as a matter of right. Undoubtedly, Rule 10 confers discretion on the Company to pay the gratuity even if the same is earned by satisfying the conditions subject to which gratuity becomes payable. Rule 10 provides that "all retiring gratuities granted under the rules shall be at the absolute discretion of the Company irrespective of whether an employee has or has not performed all or any of the conditions set out in the rules and no employee howsoever otherwise eligible shall be deemed to be entitled as of right to any payment under the rules". Such absolute discretion is wholly destructive of the character of gratuity as a retiral benefit. It is satisfactorily established and the High Court has so ruled that payment of gratuity was a condition of service albeit implied condition of service which part does not stand scrutiny. 1946 Act was amended specifically in 1956 by Amending Act 36 of 1956 by which power was conferred upon the Certifying Officer or appellate authority to adjudicate upon the fairness or reasonableness**

of the provisions of any standing orders. It is not clear whether the Rule 10 which appears to have been framed in the heyday of laissez-faire has been recast, modified or amended to bring the same in conformity with the modern notions of social justice and Part IV of the Constitution. Assuming it is not done, the Court while interpreting and enforcing the relevant rules will have to bear in mind the concept of gratuity. The fundamental principle underlying gratuity is that it is a retirement benefit for long service as a provision for old age. Demands of social security and social justice made it necessary to provide for payment of gratuity. On the enactment of Payment of Gratuity Act, 1972 a statutory liability was case on the employer to pay gratuity.

Pension and gratuity coupled with contributory provident fund are well-recognised retiral benefits. These retiral benefits are now governed by various statutes such as the Employees' Provident Fund and Miscellaneous Provisions Act, 1952, the Payment of Gratuity Act, 1972. These statutes were legislative responses to the developing notions of fair and humane conditions of work, being the promise of Part IV of the Constitution. Article 37 provides that "the provisions contained in Part IV – Directive Principles of State Policy, shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws". Article 41 provides that "the

State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want". Article 43 obligates the State "to secure, by suitable legislation to all workers, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure….". The State discharged its obligation by enacting these laws. But much before the State enacted relevant legislation, the trade unions either by collective bargaining or by statutory adjudication acquired certain benefits, gratuity being one of them. Pension and gratuity are both retiral benefits ensuring that the workman who has spent his useful span of life in rendering service and who never got a living wage, which would have enabled him to save for a rainy day, should not be reduced to destitution and penury in his old age. As a return of long service he should be assured social security to some extent in the form of either pension, gratuity or provident fund whichever retiral benefit is operative in the industrial establishment. It must not be forgotten that it is not a gratuitous payment, it has to be earned by long and continuous service.

Can such social security measure be denuded of its efficacy and enforcement by so interpreting the relevant rules that the workman could be denied the same at the absolute discretion of the employer notwithstanding the fact that he or she has earned the same by long

continuous service? If Rule 10 is interpreted as has been done by the High Court, such would be the stark albeit unpalatable outcome. It is therefore necessary to take a leaf out of history bearing on the question of retiral benefits like pension to which gratuity is equated. In *Burhanpur Tapti Mills Ltd. v. Burhanpur Tapti Mills Mazdoor Sangh* this Court observed that : "a scheme of gratuity and a scheme of pension have much in common. Gratuity is a lump sum payment while pension is a period payment of a stated sum". Undoubtedly both have to be earned by long and continuous service.

For centuries the courts swung in favour of the view that pension is either a bounty or a gratuitous payment for loyal service rendered depending upon the sweet will or grace of the employer not claimable as a right and therefore, no right to pension can be enforced through court. This view held the field and a suit to recover pension was held not maintainable. With the modern notions of social justice and social security, concept of pension underwent a radical change and it is now well-settled that pension is a right and payment of it does not depend upon the discretion of the employer, nor can it be denied at the sweet will or fancy of the employer. *Deokinandan Prasad v. State of Bihar, State of Punjab v. Iqbal Singh* and *D.S. Nakara v. Union of India.* If pension which is the retiral benefit as a measure of social security can be recovered through civil suit, we see no justification in treating gratuity on a different footing. Pension

and gratuity in the matter of retiral benefits and for recovering the same must be put on par.

The question then is : can the Court ignore Rule 10? If gratuity is a retiral benefit and can be earned as a matter of right on fulfilling the conditions subject to which it is earned, any rule conferring absolute discretion not testable on reason, justice or fair play must be treated as utterly arbitrary and unreasonable and discarded. If rules for payment of gratuity became incorporated in the Standing Orders and thereby acquired the status of statutory condition of service, an arbitrary denial referable to whim, fancy or sweet will of the employer must be rejected as arbitrary. Section 4 of the 1946 Act which confers power on the Certifying Officer or appellate authority to adjudicate upon the fairness or reasonableness of the provisions would enable this Court to reject that part of Rule 10 conferring absolute discretion on the employer to pay or not to pay the gratuity even if it is earned as utterly unreasonable and unfair. It must be treated as ineffective and unenforceable. It is well-settled that if the Certifying Officer and the appellate authority under the 1946 Act while certifying the Standing Orders has power to adjudicate upon the fairness or reasonableness of the provisions of any standing orders, this Court in appeal under Article 136 shall have the power to do the same thing when especially it is called upon to enforce the unreasonable and unfair part of the Standing Order. It therefore follows that part of Rule 10 which confers absolute discretion on the

employer to pay gratuity even if it is earned, at its absolute discretion is ineffective and unenforceable. This approach does not acquire any precedent but if one is needed the decision of this Court in *Western India Match Company Ltd.* case clearly rules to that effect. In that case, the company relied on a special agreement which was to some extent in derogation of the provisions of the Certified Standing Order. The Court observed that to uphold such special agreement would mean giving a go-by to the principle of three party participation, in the settlement of the terms of employment, as represented by the Certified Standing Orders and therefore, the inconsistent part of special agreement is ineffective and unenforceable. The claim to absolute discretion not to pay gratuity even when it is earned is a hangover of the laissez faire days and utterly inconsistent with the modern notions of fair industrial relations and therefore, it must be rejected as ineffective and hence unenforceable."

The Hon'ble Supreme Court in ***Bakshish Singh Versus M/s Darshan Engineering Works and Others, (1994) 1 SCC 9*** has held that the provisions for payment of gratuity contained in Section 4(1)(b) of the Act are one of the minimal service conditions which must be made available to the employees notwithstanding the financial capacity of the employer to bear its burden. Their Lordships have held as under:-

"It would thus be apparent both from its object as well as its provisions that the Act was

placed on the statute book as a welfare measure to improve the service conditions of the employees. The provisions of the statute were applied uniformly throughout the country to all establishments covered by it. They applied to all employees drawing a monthly salary upto a particular limit in factories, shops and establishments etc. whether the employees were engaged to do any skilled, semi-skilled, unskilled, manual, supervisory, technical or clerical work. The provisions of the Act were thus meant for laying down gratuity as one of the minimal service conditions available to all employees covered by the Act. There is no provision in the Act for exempting any factory, shop etc. from the purview of the Act covered by it except those where, as pointed out above, the employees are in receipt of gratuity or pensionary benefits which are no less favourable than the benefit conferred under the Act. The payment of gratuity under the Act is thus obligatory being one of the minimum conditions of service. The non-compliance of the provisions of the Act is made an offence punishable with imprisonment or fine. It is settled law that the establishments which have no capacity to give to their workmen the minimum conditions of service prescribed by the Statute have no right to exist [vide Bijay Cotton Mills Ltd. v. State of Aimer, Crown Aluminium Works v. Workmen and U. Unichoyi v. State of Kerala].

On both grounds, therefore, viz. that the provisions for payment of gratuity contained in

Section 4(1)(b) of the Act are one of the minimal service conditions which must be made available to the employees notwithstanding the financial capacity of the employer to bear its burden and that the said provisions are a reasonable restriction on the right of the employer to carry on his business within the meaning of Article 19(6) of the Constitution, the said provisions are both sustainable and valid. Hence the decision of the High Court has to be set aside."

The Apex Court has held in ***DTC Retired Employees' Association and Others Versus Delhi Transport Corporation and Others, (2001) 6 SCC 61*** as under:-

"Gratuity is essentially a retiring benefit payable to a workman which as per the statute has been made payable on voluntary resignation as well. Gratuity is a reward for good, efficient and faithful service rendered for a considerable period. A workman gains experience during his tenure of employment. An experienced workman is capable of securing another employment with better emoluments. He can also be tempted by other employers with more lucrative salary. The exit of an experienced workman would surely be a loss for his employer. In *British Paints (India) Ltd. v. Workmen* it was held that: (AIR p. 734, para 8)

"A longer minimum in the case of voluntary retirement or resignation makes it more probable that the workmen would stick to the company where they are working. That is why gratuity schemes usually provide for a longer minimum in

> **the case of voluntary retirement or resignation."**

The Apex Court though has held in ***Ahmedabad Pvt. Primary Teachers' Assn. Versus Administrative Officer and Others, (2004) 1 SCC 755*** that the teachers are not workmen within the Payment of Gratuity Act, 1972, but has held that the main purpose and concept of gratuity is to help the workman after retirement, whether retirement is a result of superannuation or physical disablement or impairment of vital part of the body. Their Lordships have also noticed that in several States separate statutes, Rules and Regulations granting gratuity benefits to teachers in educational institutions which are more or less beneficial than the gratuity benefits provided under the Act exit and it was for the legislature to take cognizance of this situation of such teachers in various establishments where gratuity benefits were not available and think of a separate legislation for them. Their Lordships have held as under:-

> **"The Act is a piece of social welfare legislation and deals with the payment of gratuity which is a kind of retiral benefit like pension, provident fund etc. As has been explained in the concurring opinion of one of the learned Judges of the High Court "gratuity in its etymological sense is a gift, especially for service rendered, or returned for favours received". It has now been universally recognized that all persons in society need protection against loss of income due to unemployment arising out of incapacity to work**

due to invalidity, old age etc. For the wage-earning population, security of income, when the worker becomes old or infirm, is of consequential importance. The provisions contained in the Act are in the nature of social security measures like employment insurance, provident fund and pension. The Act accepts in principle compulsory payment of gratuity as a social-security measure to wage-earning population in industries, factories and establishments.

Thus, the main purpose and concept of gratuity is to help the workman after retirement, whether retirement is a result of rules of superannuation or physical disablement or impairment of vital part of the body. The expression "gratuity" itself suggests that it is a gratuitous payment given to an employee on discharge, superannuation or death. Gratuity is an amount paid unconnected with any consideration and not resting upon it, and has to be considered as something given freely, voluntarily or without recompense. It is a sort of financial assistance to tide over post-retiral hardships and inconveniences.

Our conclusion should not be misunderstood that teachers although engaged in a very noble profession of educating our young generation should not be given any gratuity benefit. There are already in several States separate statutes, rules and regulations granting gratuity benefits to teachers in educational institutions which are more or less beneficial than the gratuity benefits provided

under the Act. It is for the legislature to take cognizance of situation of such teachers in various establishments where gratuity benefits are not available and think of a separate legislation for them in this regard. That is the subject-matter solely of the legislature to consider and decide."

The Hon'ble Rajasthan High Court in a land mark judgment in ***Tara Chand Chokdayat Versus State of Rajasthan, 1999 (8) SLR 395*** has held that the teachers of aided educational institutions are entitled for gratuity, pension and other allowances as are admissible to the employees of the Government Educational Institutions. The learned Single Judge has held as under:-

"Prima facie, I am of the view that the petitioners being employees of the non-Government educational aided institution functioning within the State of Rajasthan are entitled for the payment of gratuity, pension as well as other allowances as admissible to the employees of the Government Educational Institutions functioning in the State of Rajasthan and are to be treated at par with the similarly placed teachers of the Central Government Educational Institutions which are protected by the provisions of Section 4(2) of the Act of 1972 and the Payment of Gratuity (Central) Rules 1972."

The scheme called **"Contributory Provident Fund-cum-Pension-cum-Insurance Scheme"** for the teachers employed in Government Aided Schools in the Union

Territories was in existence vide notification dated 2nd September, 1966. If a scheme was in existence since 1966, there is no reason why a similar scheme should not be framed for the teachers of Government Aided Schools in the State of Himachal Pradesh.

Accordingly, in view of the concept of pension and gratuity explained by the Apex Court, being social security, it is imperative for the State to formulate a scheme governing the pension and gratuity to be paid to the teachers of Government Aided and private schools. Consequently, the State is directed to frame a scheme for payment of pension and gratuity to the teachers of Government Aided and private schools in the State of Himachal Pradesh in view of the observations made hereinabove. The scheme be formulated within a period of three months from today.

The writ petition is accordingly disposed of. There shall be no order as to costs.

(Rajiv Sharma) Judge.

July 18, 2007.
(sck)